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Nos. 88-1198, 88-1393

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1988

FEDERAL TRADE COMMISSION

Petitioner,

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION,

Ralph J. Perrotta
Karen E. Koskoff
Reginald G. Addison
Joanne D. Slaight

Respondents.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.,

Cross-Petitioners,

v.

FEDERAL TRADE COMMISSION,

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF 14 STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

ROBERT K. CORBIN *
Attorney General
State of Arizona
ALISON J. BUTTERFIELD
Chief Counsel, Antitrust Division
1275 West Washington
Phoenix, Arizona 85007
(602) 542-4751

ROGER A. TELLINGHUISEN
Attorney General
JEFFREY P. HALLEM
Assistant Attorney General
State Capitol Building
Pierre, South Dakota 57501
(605) 773-3215

*Counsel of Record on Behalf of Amici States

June 22, 1989 (Additional Counsel Listed Inside)

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LIST OF COUNSEL

Counsel for the State of Alaska

DOUGLAS B. BAILY
Attorney General
RICHARD D. MONKMAN
Assistant Attorney General
P. O. Box K, State Capitol
Juneau, Alaska 99811
(907) 465-3600

Counsel for the State of Colorado

DUANE WOODARD
Attorney General
THOMAS P. McMAHON
First Assistant Attorney General
Chief, Antitrust Unit
Colorado Department of Law
1525 Sherman Street, 3rd Floor
Denver, Colorado 80203
(303) 866-5158

Counsel for the State of Delaware

CHARLES M. OBERLY, III
Attorney General
DAVID G. CULLEY
Deputy Attorney General
Carvel State Office Building
820 North French Street
Wilmington, Delaware 19801
(302) 571-2500

LIST OF COUNSEL—Continued

Counsel for the State of Hawaii

WARREN PRICE, III
Attorney General
Department of the Attorney General
State Capitol
Honolulu, Hawaii 96813
(808) 548-4740

Counsel for the State of Iowa

THOMAS J. MILLER
Attorney General
JOHN R. PERKINS
Deputy Attorney General
Hoover Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5164

Counsel for the State of Kansas

ROBERT T. STEPHAN
Attorney General
JOHN W. CAMPBELL
Deputy Attorney General
Chief, Litigation Division
MARK S. BRAUN
Assistant Attorney General
Antitrust Section
Judicial Center, 2nd Floor
Topeka, Kansas 66612
(913) 296-2215

LIST OF COUNSEL—Continued

Counsel for the State of Kentucky

FREDERIC J. COWAN
Attorney General
JAMES M. RINGO
Assistant Attorney General
State Capitol Building
Frankfort, Kentucky 46601
(502) 564-4011

Counsel for the State of Louisiana

WILLIAM J. GUSTE, JR.
Attorney General
ANNE F. BENOIT
Assistant Attorney General
Chief, Antitrust Division
Louisiana Department of Justice
2-3-4 Loyola Building, 7th Floor
New Orleans, Louisiana 70112-2096
(504) 568-5575

Counsel for the State of Maryland

J. JOSEPH CURRAN, JR.
Attorney General
MICHAEL F. BROCKMEYER
Assistant Attorney General
Chief, Antitrust Division
ELLEN S. COOPER
Assistant Attorney General
7 North Calvert Street
Baltimore, Maryland 21202
(301) 576-6470

LIST OF COUNSEL—Continued

Counsel for the State of Nebraska

ROBERT M. SPIRE
Attorney General
DALE A. COMER
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

Counsel for the State of Texas

JIM MATTOX
Attorney General of Texas
MARY F. KELLER
First Assistant Attorney General
LOU McCREARY
Executive Assistant Attorney General
ALLENE D. EVANS
Assistant Attorney General
Chief, Antitrust Division
P. O. Box 12548
Austin, Texas 78711-2548
(512) 463-2185

Counsel for the State of Wisconsin

DONALD J. HANAWAY
Attorney General
MARK E. MUSOLF
Deputy Attorney General
KEVIN J. O'CONNOR
Assistant Attorney General
MATTHEW J. FRANK
Assistant Attorney General
P. O. Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8986

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INTRODUCTION

The Amici States submit this brief in support of the Petitioner Federal Trade Commission. The decision of the District of Columbia Circuit in *Superior Court Trial Lawyers Association v. Federal Trade Commission*, 856 F.2d 226 (D.C. Cir. 1988), should be reversed.

INTEREST OF THE AMICI STATES

The Amici States have a vital interest in preventing an unwarranted expansion of immunity from the antitrust laws. First, the attorneys general are the chief law officers of their states and are charged with the duty of enforcing the antitrust laws. As such, they are the primary public enforcers of the state antitrust laws, which are often interpreted in conformity with federal law.[1] The attorneys general also represent their states and political subdivisions in federal antitrust actions for damages and injunctive relief. In their capacity as *parens patriae*, they are authorized to bring federal antitrust actions on behalf of the citizens of their states.[2] The states play a major role in antitrust enforcement and have a substantial interest in making sure that the antitrust laws are interpreted in accord with antitrust policy and the Supreme

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[1] E.g., *Red Wing Shoe Co., Inc. v. Shearer's, Inc.*, 1989 (CCH) Trade Cas. ¶ 68,575 (Tex. Civ. App. 1989).

[2] 15 U.S.C. § 15(c); *Georgia v. Pennsylvania R. R. Co.*, 324 U.S. 439 (1945) (common law parens patriae); *Hawaii v. Standard Oil*, 405 U.S. 251 (1972).

Court's prior decisions. Immunizing boycotts that are utilized to impose price-fixing agreements ("price-fixing boycotts") would allow anti-competitive conspiracies to continue unchecked.

Moreover, the attorneys general represent municipalities, counties, state agencies and other governmental entities whose purchases together account for 12% of the gross national product.[3] The attorneys general have a vital interest in maintaining the integrity of the process by which those transactions are accomplished. The novel exemption fashioned by the court of appeals would corrupt the process by which governments acquire goods and services and would virtually invite imposition of price-fixing boycotts against governments.

In addition, these local governments administer numerous programs similar to the District of Columbia's program for appointment of private counsel to represent indigent persons charged with crimes in the District of Columbia Superior Court. Expanding the limits of First Amendment protection in the manner urged by the respondent Superior Court Trial Lawyers ("SCTLA") would create an enormous loophole in antitrust law that would inevitably impede states' efforts to preserve and foster competition.

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[3] U. S. Bureau of the Census, statistical Abstract of the United States 1989, at 421 (109th ed. 1988). In 1987, state and local government purchases amounted to 542.8 billion dollars. *Id.*

As the primary public enforcers of the state antitrust laws and as representatives of the primary victims of the anticompetitive conduct encouraged by the lower court's opinion, the Amici States have a substantial interest in ensuring that federal courts apply the antitrust laws in a manner consistent with underlying congressional policy, this Court's past decisions, and sound public policy.

The Amici States support the Federal Trade Commission's contention that a price-fixing boycott directed at a government purchaser is a *per se* violation of the Sherman Act without regard to a demonstration of market power.

SUMMARY OF ARGUMENT

1. The court of appeals erred in holding that the "use of the *per se* rule without proof of market power is inappropriate as applied to a price-fixing boycott that served, in part, to make a statement on a matter of public debate." This Court's most recent pronouncement of the *Noerr* doctrine[4] in *Allied Tube & Conduit Corp. v. Indian Head*, 108 S. Ct. 1931 (1988), resolves the question whether a price-fixing boycott, such as that at issue here, is protected activity under the First Amendment and beyond the reach of the Sherman Act. Under *Allied Tube*,

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[4] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 123 (1961).

the SCTLA's price-fixing boycott at issue is not protected as "political activity" and is not protected as a "political boycott." It was unnecessary and redundant for the court of appeals to analyze the price-fixing boycott as "expressive conduct." The proper way to address the First Amendment concerns is with application of the *Noerr* doctrine and not by eroding the *per se* rule.

2. The court of appeals concluded that before a price-fixing boycott could be declared unlawful, proof of significant market power was required in order to demonstrate that the boycott succeeded because it was coercive rather than persuasive. The court of appeals' holding contravenes over eighty years of antitrust jurisprudence in which this Court has consistently held that horizontal combinations formed for the purpose and effect of tampering with the price of a commodity and service are unlawful *per se* under the Sherman Act. Such agreements are unlawful *per se* without any demonstration of market power. Requiring proof of market power to condemn a price-fixing boycott is unprecedented and creates formidable barriers to antitrust enforcement. Moreover, it replaces the efficiency and clarity of the *per se* rule with a novel market power test that promotes confusion.

3. The court of appeals' application of market power to determine the lawfulness of a restraint of trade involving "expressive conduct" goes well beyond this Court's prior application of market power analysis. The absence of market power does not justify a naked restriction on price or output.

Moreover, the purpose of inquiries into market power is to determine the actual or potential anticompetitive effects of an arrangement. Proof of actual anticompetitive effects obviates the need for inquiry into market power. The court of appeals rejected traditional demonstrations of market power and required proof of market power sufficient to demonstrate that the boycott succeeded because it was "coercive rather than persuasive." Such a requirement is unprecedented and is virtually impossible to apply. The court of appeals gave no useful guidance regarding what level of market power suffices to render unlawful a price-fixing boycott that is claimed to be "expressive conduct."

4. If the defense that price-fixing is being used to communicate a point of view can render an otherwise *per se* violation of the antitrust laws lawful, it is likely to be invoked in every case. It will substantively weaken antitrust enforcement and will encourage price-fixing at least with respect to goods and services purchased by governments.

ARGUMENT

The court of appeals held that a concerted boycott by competing private practice attorneys in order to increase fees paid for their representation of indigent criminal defendants may be constitutionally protected activity. The court recognized that the SCTLA boycott could properly be condemned as a *per se* violation of the Sherman Act unless it came within the protection of the First

Amendment. *Superior Court Trial Lawyers Association*, 856 F.2d at 241.[5]

In reviewing possible sources of protection, the court rejected the claim that SCTLA's conduct was entitled to complete First Amendment immunity under the *Noerr* doctrine. *Superior Court Trial Lawyers Association*, 856 F.2d at 247. The court also rejected SCTLA's contention that its conduct was a "political boycott" and thereby completely immune under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). *Id.* Though the court of appeals found the boycott was not immune from the antitrust laws under either *Noerr* or *Claiborne*, it concluded that the conduct could not be condemned without proof of market power. The court reached this conclusion by applying the test for evaluating "expressive conduct" articulated in *United States v. O'Brien*, 391 U.S. 367 (1968). In applying the *O'Brien* test, the court concluded that use of the *per se* rule "without proof of market power is inappropriate as applied to a boycott that served, in part, to make a statement on a matter of public debate." *Superior Court Trial Lawyers Association*, 856 F.2d at 250.

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[5] "Since no 'pro-competitive' justification, that is no justification that is consistent with the purposes of the antitrust laws, has been offered in its defense . . . the boycott could properly be condemned as a *per se* violation of section 1 of the Sherman Act. . . ." *Superior Court Trial Lawyers Association*, 856 F.2d at 241.

I. THE COURT OF APPEALS EVISCERATES THIS COURT'S DECISION IN *ALLIED TUBE*.

The Amici States assert that the court of appeals erred when it applied the *O'Brien* test after holding that SCTLA's horizontal price-fixing boycott was not immunized under *Noerr* or *Claiborne Hardware* pursuant to this Court's guidance in *Allied Tube*. *Allied Tube* is controlling precedent which resolves the First Amendment issues the court of appeals raised by applying the *O'Brien* test. The court of appeals' action has the effect of nullifying the precedential value of *Allied Tube* in governing the application of the Sherman Act to restraints of trade like the SCTLA boycott.

In the development of the *Noerr* doctrine, this Court has crafted a careful balance between the Sherman Act and the First Amendment. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *Allied Tube & Conduit Corp. v. Indian Head*, 108 S. Ct. 1931 (1988). There this Court recognized that the antitrust laws do not apply to concerted solicitation of anticompetitive government action unless the concerted solicitation itself amounts to a mere sham.

The Court in *Noerr* defined for the first time the relationship between the First Amendment right to petition and the Sherman Act. The Court held that an open public campaign designed to influence the legislature would not violate the antitrust laws even though it had an anticompetitive effect. This Court refused to "lightly impute to Congress an intent to invade [First Amendment] freedoms." 365 U.S. at 138. It reasoned that the legislative history of the Sherman Act provided no basis for concluding that its purpose was "to regulate, not business activity, but political activity." *Id.* at 137. In *Pennington*, the Supreme Court extended the doctrine to attempts to influence the executive branch. This Court stated that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670.

In *Allied Tube*, however, this Court determined that even apart from any finding of mere sham, the *Noerr* doctrine does not immunize all petitioning conduct. This Court held that *Noerr* immunity does not protect the collective efforts of a private standards setting organization merely because the model codes agreed upon are subsequently adopted by governments. This Court established guidelines for determining whether collective conduct falls within the ambit of *Noerr*. There the Court said that "the scope of protection depends on the source context, and nature of the anticompetitive restraint at issue." *Allied Tube*, 108 S. Ct. at 1936.

In the instant case, the court of appeals acknowledged that "dicta in *Allied Tube* strongly suggest that *Noerr* does not extend to restraints indistinguishable from the one before us." *Superior Court Trial Lawyers Association*, 856 F.2d at 247. The court of appeals quoted the following passage from *Allied Tube*:

> We cannot agree with Petitioner's absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. But see *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-463 (1945). Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. But see *Georgia v. Evans*, 316 U.S. 159 (1942). Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action.

Allied Tube, 108 S. Ct. at 1938-39 (parallel citations omitted). The court of appeals correctly determined that *Noerr* immunity was not available

to protect the SCTLA boycott from antitrust scrutiny. *Superior Court Trial Lawyers Association*, 856 F.2d at 247.

Moreover, respondents' boycott is not entitled to First Amendment protection as a "political boycott" under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). There, this Court held that a boycott of white retailers by black consumers in order to vindicate important constitutional rights was protected by the First Amendment from a claim that it violated state tort law. The "political boycott" doctrine articulated in *Claiborne Hardware*, however, does not encompass commercial boycotts by economic competitors who stand to reap economic benefit for themselves. Citing *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), the *Claiborne* Court said, "[t]he right of business entities to 'associate' to suppress competition may be curtailed." *Id.*

In *Allied Tube*, this Court reiterated that *Claiborne Hardware* is limited to cases that do not involve economic competitors seeking economic benefits.

> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), is not to the contrary. In that case we held that the First Amendment protected the nonviolent elements of a boycott of white merchants organized by the National Association for the Advancement of Colored People and designed to make white government and business leaders comply with a list of

> demands for equality and racial justice. Although the boycotters intended to inflict economic injury on the merchants, the boycott was not motivated by any desire to lessen competition or to reap economic benefits but by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution, and the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market. *Id.*, 458 U.S., at 914-915. Here, in contrast, petitioner was at least partially motivated by the desire to lessen competition, and, because of petitioner's line of business, stood to reap substantial economic benefits from making it difficult for respondent to compete.

Allied Tube, 108 S. Ct. at 1941 (parallel citations omitted).

The court of appeals applied the *Claiborne Hardware* analysis to the SCTLA boycott and concluded that it was outside the protection of the First Amendment. The court noted that the First Amendment protection in *Claiborne Hardware* "rests on the findings that the boycott was not motivated by any desire to lessen competition or to reap economic benefits. . . ." *Superior Court Trial Lawyers Association*, 856 F.2d at 245.

The cited passages from *Allied Tube*, although dicta, virtually dispose of the SCTLA boycott as if it were then before the Court. The SCTLA boycott is not "political activity" protected by the *Noerr* doctrine and is not a "political boycott" protected by *Claiborne Hardware*. The court of appeals concluded, however, that the absence of protection

under either *Noerr* or *Claiborne Hardware* did not conclusively resolve the claim that the SCTLA's boycot' is entitled to First Amendment protection.

Notwithstanding the court of appeals' recognition and application of *Allied Tube* in reviewing the SCTLA's boycott, the court determined further analysis was needed before the boycott could be condemned under the Sherman Act. The court's justification for further analysis was the presence of an element of expression contained in the boycott warranting First Amendment protection. *Superior Court Trial Lawyers Association*, 856 F.2d at 247. The court of appeals turned to the test first enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968), to evaluate the First Amendment protection of "expressive conduct." This four-part test was devised by this Court to determine whether a Vietnam War protestor's draft card burning was protected under the First Amendment. This Court held that a "regulation is sufficiently justified (1) if it is within the constitutional power of the government; (2) if it furthers an important or substantial government interest; (3) if the government's interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms was no greater than is essential to the furtherance of that interest." *Id.* at 377.

The court of appeals easily found that condemnation of the SCTLA boycott met the first three parts of the *O'Brien* test. *Superior Court Trial Lawyers Association*, 856 F.2d at 248. With

respect to the fourth requirement, however, -- that the incidental restriction on alleged First Amendment freedoms is no greater than is essential to furtherance of the governmental interest -- the court of appeals concluded that a demonstration of market power was essential to evaluating the importance of the governmental interest at stake here.

It was error to use the *O'Brien* test after the court had already determined that under *Allied Tube* the price-fixing boycott was commercial activity primarily motivated by economic self-interest and thereby within the reach of the Sherman Act. In determining that the boycott was commercial activity and not political activity, the Court had already balanced the respective interests of society in our system of free enterprise with its unfettered marketplace against the First Amendment rights of speech and petition. The court of appeals recognized that it was in fact "[a]ccommodating the government's interest in regulating harmful economic activity to the right of citizens to engage in joint political action. . . ." *Superior Court Trial Lawyers Association*, 856 F.2d at 246.

The *O'Brien* balancing of governmental rights against individual rights was subsumed in the court of appeals' *Allied Tube* analysis because *Noerr* and *Claiborne Hardware*, in essence, address in an economic setting petitioning the government and speech elements of a boycott as "expressive

conduct."[6] The court of appeals analyzed the SCTLA boycott under *Allied Tube*, balanced the competing interests, and concluded that the government's interest predominates, that is, the Sherman Act was applicable to declare the price-fixing boycott unlawful.

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[6] In *Claiborne*, this Court addressed the validity of economic regulation that "may have an incidental effect on rights of speech and association." *Claiborne Hardware*, 458 U.S. at 912. In *Claiborne*, this Court applied the *O'Brien* test to evaluate the validity of economic regulation that would have rendered the NAACP boycott unlawful, *Id.* at n.47. *Claiborne* analyzed the "petitioning" element of the NAACP boycott under *Noerr*. *Id.* at 913-14. ("It is not disputed that a major purpose of the boycott in this case was to influence governmental action.") The speech element was evaluated under the *O'Brien* test. "The established elements of speech, assembly, association and petition, though not identical, are inseparable." *Id.*, at 911. The following passage from *Noerr* demonstrates that there, the court was in fact engaged in the same sort of analysis.

> The proscription of the [Sherman] Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. *Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities*, a caution which has been reflected in the decisions of this court interpreting such legislation.

Noerr, 365 U.S. at 141.

To balance these interests once again under *O'Brien* in the guise of "expressive conduct" was redundant. Embarking on the *O'Brien* test after having already determined that the boycott was within the reach of the Sherman Act was error. The court of appeals compounded its error when it reached inconsistent conclusions using the two approaches. The court of appeals in applying *O'Brien* lost sight of the fact that the *Allied Tube* analysis is by its nature limited to an inquiry into whether antitrust laws apply to particular conduct at all. In that sense, *Allied Tube* is a restatement of the *O'Brien* test appropriate to the commercial context of the antitrust laws. Neither *O'Brien* nor *Allied Tube* stand as a warrant for the court to have engaged in wholesale reordering of rules of law already found applicable.

II. THE COURT OF APPEALS' ABROGATION OF THE *PER SE* RULE OBSTRUCTS EFFECTIVE ANTITRUST ENFORCEMENT.

The court of appeals' application of the *O'Brien* case to the facts here is unprecedented. It determined that a naked price-fixing boycott that resulted in actual detrimental effects, could not, on that basis alone, be condemned. This determination was based upon the fact that overt acts in furtherance of the restraint of trade constituted "expressive conduct" which raised First Amendment considerations. The court of appeals concluded that before the restraint of trade could be declared unlawful, proof of significant market power -- which would conclusively demonstrate that the

boycott succeeded because it was "coercive rather than persuasive" -- was required. *Superior Court Trial Lawyers Association*, 856 F.2d at 253.

The court of appeals' holding contravenes over eighty years of precedent, in which this Court has constantly adhered to the principle that horizontal combinations formed for the purpose and effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity or service are unlawful *per se* under the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); *See also United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). The court of appeals' determination also contravenes this Court's statement that even under rule of reason analysis, proof of market power is not necessary to determine the unreasonableness of a restraint of trade if actual anticompetitive effects are shown. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

To require proof of "market power" to condemn a naked price-fixing boycott creates a formidable obstacle to state and federal enforcement of the antitrust laws. The court of appeals' novel market power requirement would, if adopted, complicate, forestall, and possibly preclude condemnation of clearly anticompetitive conduct and weaken deterrence of undesirable economic behavior.

The court of appeals' subordination of the antitrust rights of the public to economic interests

of competing businessmen is inconsistent with previous statements of this Court regarding the importance of those antitrust rights. For example, this Court, in *United States v. Topco Associates*, 405 U.S. 596, 610 (1972), stated:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

Next, the court of appeals also reasoned that the *per se* rule could be abandoned here because it is not a statutory command, but merely a rule of administrative convenience. *Superior Court Trial Lawyers Association*, 856 F.2d at 249. The *per se* rule is more than an administrative convenience.[7]

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[7] Moreover, the court of appeals erred in concluding that the *per se* rule, even if viewed only as an administrative aid, should not be upheld under the *O'Brien* test. In *United States v. Albertini*, 472 U.S. 675 (1985), this Court held that the general exclusion of a "bar letter" receipient from a military open house does not violate the First Amendment, stating that:

> Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech. (Citation omitted.) Instead, an incidental burden on speech is no greater than is essential and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.

Id., at 689.

This Court has recognized that the "*per se* rule" is a valid and useful tool for antitrust policy and enforcement to preserve this nation's economic freedoms.[8] *See Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 5 (1978). This Court in *Northern Pacific Railway Company v. United States*, 356 U.S. 1, 5 (1958) stated:

> This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken.

See also 7 P. Areeda, *Antitrust Law*, ¶1509, at 408-414 (1986).

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[8] State antitrust law, either through case law or statute, expressly recognizes price-fixing agreements and other similar conduct as *per se* violations. *E.g.*, Conn. Gen. Stat. Sec. 35-28(a)-(d) (1989); *Wedgewood Investment Corp. v. International Harvester Co.*, 126 Ariz. 157, 613 P.2d 620 (App. 1978); *Oakland-Alameda County Builders' Exchange v. Lathrop Const. Co.*, 4 Cal. 3d 354, 362-365, 93 Cal. Rptr. 602, 482 P.2d 226 (Cal. 1971); *Colorado v. Colorado Springs Board of Realtors*, 692 P.2d 1055, 1062 (Colo. 1984).

If the defense of "expressive conduct" (i.e., that price-fixing is being used to communicate a point of view) can render an otherwise *per se* violation of the antitrust laws lawful, it is likely to be invoked in every case. The result will burden litigation and, by holding out hope of exculpation, tempt more businessmen into naked trade restraints such as the price-fixing boycott at issue here. Thus, the "potential threat to the central nervous system of the economy," emasculation of the Sherman Act, and replacement of its philosophy with one which is "wholly alien to a system of free competition" apprehended and rejected by this Court in *Socony* will be revived.

In addition to prohibiting application of *per se* analysis, the court of appeals' use of market power to determine the lawfulness of a restraint of trade involving "expressive conduct" goes well beyond this Court's prior application of market power analysis. The court of appeals ignored this Court's statements in *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 109-10 (1984):

> As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.

The court of appeals recognized that the SCTLA boycott was a naked restriction on price or output but still held that market power analysis was essential before the boycott could be declared unlawful. *Superior Court Trial Lawyers Association, passim.*

The court of appeals' decision elevates market power from a mere "surrogate" for anticompetitive effects to the very measure of the government's interest in prohibiting restraints of trade. This application of market power analysis is without precedent.

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'
> 7 P. Areeda, Antitrust Law, ¶1511, p. 429 (1986).

FTC v. Indiana Federation of Dentists, 476 U.S. at 460-61.

The court of appeals accepted the Commission's findings of the SCTLA boycott's actual detrimental effects.[9] But, the court of appeals rejected the conclusion that such proven effects mandated a determination of unlawfulness. In addition, the court of appeals cautioned that even a finding of significant market power by the Commission on remand may not justify the condemnation of an "expressive" boycott. The court of appeals' imposed duty to weigh the value of alleged expressive conduct against the potential harm from such conduct, as measured by the participants' market power, obviously exceeds the proper role of any court.

The court of appeals' decision would replace the efficiency, clarity and certainty of the *per se* rule with a novel market power test that will promote confusion and attempted restraints of trade in the name of "expressive conduct." This decision is devoid of useful guidance to aid the Commission or the Amici States to determine what future expressive price-fixing boycotts and other types of *per se* restraints may remain unlawful.

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[9] The effects "dramatically reduced the supply of lawyers to the city's indigent defendant program; adversely affected the city's ability to meet constitutional obligations to provide counsel for indigent defendants; and forced the city government to increase CJA fees from a level that had been sufficient to obtain an adequate supply of CJA lawyers to a level satisfactory to the [boycotters]." *See Superior Court Trial Lawyers Association*, 856 F.2d at 251.

The court's opinion, raises the possibility that society must tolerate anticompetitive activities if they can be successfully packaged as "expressive" boycotts.

The Amici States, therefore, respectfully request that this Court reject the court of appeals' market power requirement for horizontal price-fixing boycotts and other types of conduct that have been previously determined by this Court to be unlawful *per se*. The application of market power analysis to substantiate an otherwise naked restriction on competition whenever "expressive conduct" is present, emasculates the Sherman Act, removes the deterrent effect of the *per se* rule and restricts effective law enforcement. The proper balancing test is that expressed in *Allied Tube* concerning applicability of the *Noerr* doctrine and *Claiborne Hardware*.

III. CROSS-PETITIONERS' CLAIM THAT THEIR PRICE-FIXING BOYCOTT IS "POLITICAL ACTIVITY" BEYOND THE REACH OF THE ANTITRUST LAWS IS WITHOUT SUPPORT.

Respondents, through their cross-petition, attempt to shroud their naked price-fixing boycott from antitrust scrutiny by asserting that the boycott is protected under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), as "political" activity. The Amici States are aware of no legal basis or case precedent to support respondents' claims. As presented earlier, *Allied Tube* resolves this issue.

Moreover, respondents' claimed motivation to advance the constitutional rights of indigent criminal defendants should not totally remove a price-fixing boycott from the scope of the antitrust laws. If so, antitrust enforcement will become dependent upon the creativity of the participants of a particular restraint of trade to invent political and social objectives for their anticompetitive actions. Businesses will use this "political activity protection" to apply coercive economic sanctions against governmental bodies to force regulatory changes concerning their businesses whenever they disagree with a governmental regulation or rule. It will also encourage predatory activities in the name of "political concerns." The court of appeals acknowledges as much in the following passage:

> [I]mmunizing all non-violent boycotts aimed at affecting the legislative process would free the businesses that must now compete to supply this tremendous demand instead to "lobby" for increases in the prices they receive by collectively withholding production. . . . This is the stuff of which economic chaos is made in countries that tolerate coercive political action by industry, and from which the Sherman Act has shielded this country for almost a century.

Superior Court Trial Lawyers Association, 856 F.2d at 247.

The Amici States request that this Court reject respondents' argument. *Claiborne Hardware* does not permit the conclusion that a price-fixing

boycott or other restraints of trade are "political" activity protected under the First and Fourteenth Amendments whenever political and social objectives may be advanced. Indeed, this Court previously rejected this exact argument. In *Allied Tube*, this Court determined that restraints of trade are not protected under *Claiborne Hardware* where the participants were "at least partially motivated by the desire to lessen competition, and . . . stood to reap economic benefits. . . .," 108 S. Ct. at 1941.

Limiting *Claiborne Hardware* to situations where there is an absence of anticompetitive intent strikes a proper balance between First Amendment rights and government's legitimate and substantial interests in protecting competition. Reaffirming *Allied Tube* will continue to provide protection from the antitrust laws for true political activity such as occurred in *Claiborne Hardware* and *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980). Price-fixing boycotts or other restraints of trade with political attributes such as occurred in *Allied Tube* and this case, however, will continue to be subject to the full force and effect of the federal and state antitrust laws.[10]

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[10] Respondents in their cross-petition have not challenged the FTC's factual determination that respondents' boycott was designed to restrain competition for the direct economic benefit of its members. Also, the court of appeals' opinion specifically affirmed the FTC's finding that the boycott was motivated primarily by "economic self-interest." *Superior Court Trial Lawyers Association*, 856 F.2d at 246. These facts preclude a determination that respondents' boycott was "political" activity entitled to First Amendment protections.

Price-fixing boycotts and other restraints of trade performed with anticompetitive intent cannot be condoned as part of the "political" process.

CONCLUSION

The District of Columbia Circuit's opinion should be reversed.

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Respectfully submitted,

ROBERT K. CORBIN
Attorney General
State of Arizona
ALISON J. BUTTERFIELD
Chief Counsel
Antitrust Division
1275 West Washington
Phoenix, Arizona 85007
(602) 542-4551

ROGER A. TELLINGHUISEN
Attorney General
JEFFREY P. HALLEM
Assistant Attorney General
State Capitol Building
Pierre, South Dakota 57501
(605) 773-3215

By: Robert K. Corbin

ROBERT K. CORBIN
Counsel of Record